
NO. 33530

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

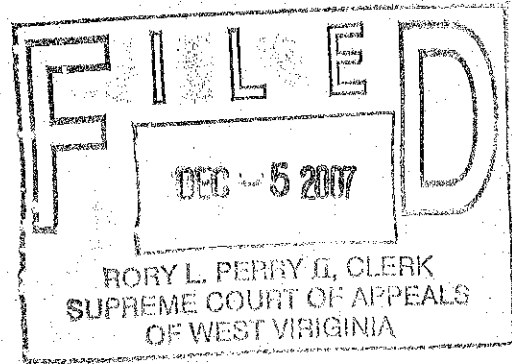
STATE OF WEST VIRGINIA,

Appellee,

v.

DREU FERGUSON, JR.,

Appellant.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW

This is an appeal by Dreu Ferguson, Jr. (hereinafter "Appellant"), from the December 7, 2006, order of the Circuit Court of Roane County (Nibert, J.), which sentenced him to a definite term of 15 years in the State penitentiary upon his conviction by a jury of one count of voluntary manslaughter in violation of West Virginia Code § 61-2-14; the lesser-included offense of first degree murder, a violation of West Virginia Code § 61-2-1, in which he was indicted. On appeal, Appellant claims that the circuit court committed error on various evidentiary grounds.

II.

STATEMENT OF FACTS

This case involves the shooting death of William Freas on June 11, 2003, in Spencer, West Virginia, by Appellant. On that day, Jeremiah Starcher was visiting Mr. Freas on the latter's porch

located on Beauty Street. (Tr. 292.) During this visit, Appellant walked up on Mr. Freas' porch with what appeared to be a 22-rifle and leaned on the latter's railing. (*Id.* at 295-96.) At this point, Appellant was positioned approximately two feet from Mr. Starcher. (*Id.* at 295.) Appellant then fired a shot to the right of Jeremiah Starcher. (*Id.* at 297.) In fear for his life, Mr. Starcher jumped off the porch to the sidewalk after this initial shot was fired. (*Id.*)

An argument then ensued regarding some personal belongings of Appellant. According to Mr. Starcher, Appellant aimed the gun at William Freas and an argument ensued. Appellant claimed that Mr. Freas had stolen some of his personal property, to which the latter denied. (*Id.* at 299.) There was a lot of yelling back and forth and profanity during this encounter. Mr. Starcher then looked over to the porch and saw Appellant aiming his gun at Mr. Freas. (*Id.* at 300.) At this point, Mr. Freas was standing with arms raised upward saying, "I didn't take your stuff. Don't shoot." (*Id.*)

Mr. Starcher testified that Mr. Freas was in no way threatening Appellant, but rather just asking the latter not to shoot. (*Id.* at 301.) Then Mr. Starcher witnessed Appellant shoot William Freas. (*Id.* at 201.) Mr. Freas said, "Oh my God." and fell back into the doorway. (*Id.*) Jeremiah Starcher testified that he then saw that there was blood all over the porch, and that Mr. Freas had a hole in the left side of his chest near the area of his heart. (*Id.* at 303.) At that point, Appellant turned and ran one way, and Mr. Starcher ran the other in order to call 911 emergency services. (*Id.*)

Two neighbors, Mr. Donald Morris and Ms. Gloria Turner, heard gunshots coming from Mr. Freas' house. Upon hearing the noise, they both ran out of their respective houses and saw Appellant running from the crime scene with a gun in his hand. (*Id.* at 328-29, 335-39.)

At approximately 11:56 a.m. on the day of the shooting, Spencer Chief of Police Gary Williams responded to the 911 dispatch to his police department. (*Id.* at 213.) He and Sergeant Michael Harper of his agency, as well as the sheriff and members of the West Virginia State Police responded to the call. (*Id.* at 213-14.) When he arrived there, one of his officers informed him that there had been a shooting, and he discovered the victim dead at the entrance of his porch. Based on the interviews conducted at the crime scene, Appellant became a suspect. (*Id.* at 217-18.) Chief Williams also found two spent shell casings on the floor of the porch at the scene. (*Id.*) The officer also discovered a single gunshot wound to the victim's chest. (*Id.* at 222.)

The next day, June 13, 2003, Chief Williams received a call from the Gordon County Sheriff's Office in English, Indiana, stating that they had taken Appellant into custody. (*Id.* at 227-28.) Appellant waived the extradition process, and Chief Williams picked him up the next day to transport him back to West Virginia. (*Id.* at 228.) Prior to transporting Appellant back to the State, he had been advised of his Miranda rights. (*Id.*) While being transported, Appellant asked the officer if the victim suffered, to which the latter replied that he did not. (*Id.* at 230.) Later during the drive back to West Virginia, Chief Williams asked if there would be anything Appellant would have done differently. To this Appellant replied, "Well, I would not have gone up on that porch with that gun." (*Id.*) Upon return to Spencer, Appellant was arraigned. (*Id.* at 231.)

Dr. Zia Sabet, Deputy Chief Medical Examiner of the State of West Virginia, conducted an autopsy on the victim and testified at trial. He conducted this autopsy on June 12, 2004. (*Id.* at 261.) Dr. Sabet testified that he discovered a single gunshot wound on the left middle side of the chest of Mr. Freas. (*Id.* at 262.) Specifically, the wound was located on the left side of the victim's sternum. (*Id.* at 263.) The examiner estimated that the shot occurred from six inches to two feet. (*Id.*) Dr.

Sabet found the following bone and organ damage caused by the gunshot wound: a broken sternum, damaged aorta, damaged right upper lobe of the lung, and broken scapula. (*Id.* at 264.) He also found a small caliber jacketed slug or bullet under the skin in the victim's back. (*Id.*) Dr. Sabet testified that the bullet passed through the left rib, sternum, and scapula. (*Id.* at 270.) He determined that the cause of death was a single gunshot wound to the left chest, and the cause of death was homicide. (*Id.* at 267.)

On November 3, 2006, the jury found Appellant guilty of voluntary manslaughter.¹ (R. 442; Tr. 643-44.)

III.

RESPONSES TO ASSIGNMENTS OF ERROR

Appellant's assignments of error are quoted below, followed by the State's response:

- A. The Court Erred in Striking the Testimony of Dr. Timothy Saar When His Testimony Amounted to Explaining the Defendant's Lack of Capacity to Form Intent Without Saying the Buzz Words "Capacity to Form Intent."
- B. The Court Erred in Not Allowing the Defendant to Reopen His Case and Recall Dr. Timothy Saar to Correct the Technical Language Defect and Further Clarify His Testimony.
- C. The Court Erred and Prejudiced the Jury by Instructing the Jury that Dr. Saar's Testimony Was to Be Stricken from the Record Because it Did Not "Arise to the Standard Set by the West Virginia Supreme Court of Appeals" When the Evidence Should Have Been Stricken Without Comment by the Court.

¹The initial trial of Appellant resulted in a mistrial due to jury misconduct on November 5, 2004. An order declaring a mistrial was filed on November 15, 2004. (R. 255-56.)

State's Response:

Based on this Court's holding in *State v. Joseph*, 214 W. Va. 525, 590 S.E.2d 718 (2003), the State concedes error in this case and would not oppose Appellant's request for a new trial.

IV.

ARGUMENT

THE STATE ADMITS ERROR AND WOULD NOT OBJECT TO THE GRANTING OF A NEW TRIAL IN THIS CASE

Appellant asserts that the exclusion of the testimony of Dr. Saar in his case-in-chief amounted to reversible error warranting a new trial. The State concedes that Dr. Saar's testimony did meet the *Joseph* standard in order to raise a claim of diminished capacity to form the mental state required to possess an intent to kill the victim, an element of voluntary manslaughter of which he was convicted. Therefore, Dr. Saar's testimony should not have been stricken, and Appellant is entitled to a new trial.

1. Standard of Review.

““The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong.” Syl. Pt. 6, *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991), cert. denied, 502 U.S. 908, 112 S.Ct. 301, (1991).’ Syl. Pt. 1, *West Virginia Division of Highways v. Butler*, 205 W.Va. 146, 516 S.E.2d 769 (1999).” Syl. Pt. 1, *Watson v. Inco Alloys International, Inc.*, 209 W.Va. 234, 545 S.E.2d 294 (2001).

The diminished capacity defense is available in West Virginia to permit a defendant to introduce expert testimony regarding a mental disease or defect that rendered the defendant incapable, at the time the crime was committed, of forming a mental state that is an element of the crime charged. This defense is asserted ordinarily when the offense charged is a crime for which there is a lesser included

offense. This is so because the successful use of this defense renders the defendant not guilty of the particular crime charged, but does not preclude a conviction for a lesser included offense.

Syl. Pts. 2 and 3, *State v. Joseph*.

2. **Dr. Timothy Saar Did Testify That Appellant Manifested a Diminished Capacity to Form an Intent to Kill the Victim Due to Various Psychological Conditions from Which Appellant Suffered. Thus, the Testimony Should Not Have Been Stricken, but Rather Was a Question for the Jury to Weigh in Its Verdict.**

All of Appellant's assignments of error stem from the trial court's exclusion of the testimony of Dr. Timothy Saar, a psychologist and Director of Psychological Services Associates primarily located in Spencer. (Tr. 397-98.) Dr. Saar was called as an expert witness in Appellant's case-in-chief. Appellant contends that the trial court erred in excluding Dr. Saar's testimony. Specifically, he asserts that although the technical term "capacity to form intent" was not explicitly stated, the requisite mental condition and its effects were testified to by the psychologist in order to establish that Appellant lacked the capacity to form an intent to commit the offense of which he was convicted. (See Appellant's Brief at 14.) As stated above, *Joseph* established that a diminished capacity defense is made available to a defendant whereby an expert may testify that he or she manifested a mental disease or defect that rendered the person incapable at the time that the crime was committed to form the requisite mental state that is an element of the crime charged. In *Joseph*, the trial court struck the testimony of the defendant's expert who raised the diminished capacity defense. Specifically, the defendant's psychologist, Dr. Solomon, testified as follows:

All the indications . . . pointed to me that he had suffered frontal lobe damage, that his long-term knowledge was intact but he underwent tremendous personality change along with the other things I talked about.

. . . .

He knows where he is, who he is, what time of day it is, what month it is. All of those things are within normal limits. It's the executive functions that I found to be diminished to show a great loss.

....

Under the circumstances that existed there that morning, I think his ability to plan, organize, carry out decision-making processes were extremely flawed due to his brain injury. In other circumstances the situation might be different.

....

Given those circumstances, I think his ability to plan and carry out a premeditated plan of action would have been diminished.

....

I can say yes, I think within a scientific certainty that his capacity was diminished during that particular time frame.

Q. And that was the capacity to premeditate, to intend, and to have malice; is that correct?

A. Yes. Given those circumstances, that's correct.

Joseph, 214 W. Va. at 532-33, 590 S.E.2d at 725-26. The Court found that the circuit court was clearly wrong in excluding this evidence and prohibiting the defendant from presenting his defense attacking the State's case-in-chief, and reversed the case, granting him a new trial. *Id.* at 534, 590 S.E.2d at 727.

In the instant case, Dr. Saar testified that he diagnosed Appellant as suffering from schizoaffective disorder. (Tr. 404.) He stated that Appellant was manic and bipolar, as well as schizophrenic. (*Id.*) He stated that Appellant suffered from delusions and was prone to a significant amount of anxiety which caused him to have difficulty in coping with daily problems. (*Id.*) Dr. Saar also testified that Appellant suffered from depression. (*Id.* at 405.) He went on to state that the

schizo effective disorder would affect Appellant's judgment ability. (*Id.* at 406.) Specifically regarding this incident, Dr. Saar stated the following:

There was a number of things going on. Mr. Ferguson was under a significant amount of stress at the time this occurred. Apparently, he had a robbery where some of the stuff was stolen out of the house, he believed the victim taken [sic] the stuff and felt that nothing was being done about this. We know his faith in the police system because some of his delusions was [sic] minimal at best. He didn't see the police as an option for help. He was also having some marital difficulty along these times and so he's sitting there that day of the shooting and sees the individual across the way, he's under a significant amount of stress, he's unable to get his property, he feels he doesn't have the option to call the police to come get the stuff or to help him.

(Tr. 407-08.) Further in his testimony, the following exchange occurred between Appellant's counsel and Dr. Saar:

Q: Would this affect an intent, a specific intent to kill?

A: Yeah, I don't think he had any intent to kill. It goes back to what I talked about, his idea was to go out there he hasn't seen the police as an option or physical altercation [sic], he felt like going out there in force to almost kind of scare the person into admitting where the stuff was or getting the stuff back[,] so yes, I think his thinking was impaired at the time and that would drastically affect his intent. I think he had intent to go find out what happened to his stuff.

(*Id.* at 409-10.) Then Saar made the following statement during the direct examination:

Combing the schizo effective with the intense anxiety that the psychological testing showed, yes, it [the disorder he with which he diagnosed Appellant] would impair his judgment at the time with regards to intent.

(*Id.* at 410.)

Before closing arguments were given, the State made a motion to strike Dr. Saar's testimony. The trial judge granted this motion due to it not meeting the standard established by this Court in *Joseph, supra*. (Tr. 529-41.) The trial judge also struck the testimony of the State's psychiatrist due to the testimony being rebuttal to the Saar testimony. (Tr. at 540.) The judge ruled that Dr. Saar's

expert opinion testimony did not rise to the standard set for jury consideration according to *Joseph*.

The following definition of voluntary manslaughter was given to the jury in the instructions:

Voluntary manslaughter arises from the sudden heat of passion while murder is from the wickedness of the heart. Voluntary manslaughter involves an intentional killing upon sudden provocation and in the heat of passion.

It appears that Dr. Saar's testimony was substantially similar to that given by Dr. Solomon in *Joseph, supra*, with respect to a mental or psychological disorder causing a diminished capacity for one to develop the mental state to form intent regarding an element of an offense at the time of its commission; in this case, the element of intent to commit voluntary manslaughter. In light of this, the State would concede error and would not object to this Court granting Appellant a new trial. It should be noted that the State is taking this position solely on the basis that the facts and testimony brought out in the transcript of this trial are so unique and peculiar.

V.

CONCLUSION

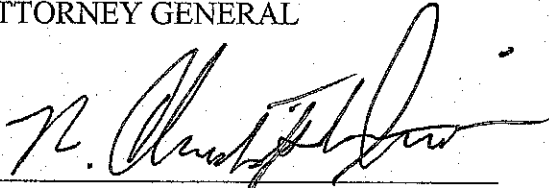
For the foregoing reasons, the judgment of the Circuit Court of Roane County should be reversed by this Honorable Court.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

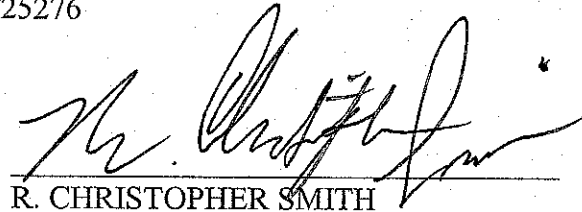
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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 5th day of December, 2007, addressed as follows:

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